Supreme Court, U.S.
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931866 MAY 20 1994

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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JOSEPH RICHARD REDNER, *Petitioner*,

v.

CAL HENDERSON, in his official capacity as Sheriff of Hillsborough County, Florida, and ROBERT BUTTERWORTH, in his official capacity as Attorney General of the State of Florida, *Respondents*.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I. Whether the Federal Court of Appeals was proper in declining to issue a certificate of probable cause pursuant to 28 U.S.C. § 2253, after the District Court dismissed the underlying Petition for Writ of Habeas Corpus and also declined to issue a Certificate of Probable Cause even though Petitioner made a substantial showing of the denial of a federal right and a clear demonstration that the issues involved in the Petitioner's case were, at the very least, debatable among jurists of reason, since the Petitioner's underlying state court conviction was based on *void* legislation and a clear denial of due process.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Joseph Richard Redner, and the Respondents, Cal Henderson, the successor in office to Walter R. Heinrich, as Sheriff of Hillsborough County, Florida, and Robert Butterworth, the Attorney General of the State of Florida.

There are no entities to report or list pursuant to Supreme Court Rule 29.1.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOSEPH RICHARD REDNER, *Petitioner*,

v.

CAL HENDERSON, as Sheriff of Hillsborough County Florida, ROBERT BUTTERWORTH, as Attorney General for the State of Florida, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Joseph Richard Redner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit, denying the issuance of a Certificate of Probable Cause, is unreported and is reprinted as Appendix "F." The Order denying the Motion for Reconsideration is reprinted as Appendix "E." The District Court Order denying the issuance of a Certificate of Probable Cause is reprinted as Appendix "G." The District Court Order

denying the Petitioner's Motion for Reconsideration of the Order dismissing the Petition for Writ of Habeas Corpus is reprinted as Appendix "H." The District Court Order dismissing the Petition for Writ of Habeas Corpus and Adopting the Magistrate's Report and Recommendation is reprinted as Appendix "I." The District Court Order denying the Petitioner's Emergency Motion for Stay of State Court Sentence and Alternative Emergency Motion for Release from Custody on Reasonable Bail is reprinted as Appendix "J." The Magistrate's Report and Recommendation is reprinted as Appendix "K." The opinions of the District Court are unreported. A related Opinion of the Florida Circuit Court is reprinted as Appendix "L."

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2254, the Petitioner brought suit in the United States District Court, Middle District of Florida on a Petition for Writ of Habeas Corpus. The Writ was dismissed on April 7, 1992. A subsequent Motion for Reconsideration was denied on November 5, 1992. An Application for a Certificate of Probable Cause, pursuant to 28 U.S.C. § 2253, was denied on August 5, 1993.

Petitioner invoked the jurisdiction of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291. The Eleventh Circuit denied the Application for a Certificate of Probable Cause on September 29, 1993. A Motion for Reconsideration was

denied on February 3, 1994. An Application for Enlargement of Time in Which to File Petition for Writ of Certiorari, pursuant to 28 U.S.C. §2101(c) and Rule 13.2 of the Rules of this Honorable Court, was filed. An Order Granting the Application for filing on or before May 20, 1994 was issued on May 3, 1994. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 5

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "...nor shall any person be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the

laws.

UNITED STATES CODE

28 U.S.C. Section 2253

APPEAL

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. Section 2254

STATE CUSTODY; REMEDIES IN FEDERAL COURTS

This statutory provision is reprinted as Appendix "M."

ORDINANCES ENACTED BY THE CITY OF TAMPA, FLORIDA

Ordinance 8068-A, City of Tampa Code is reprinted and included in its entirety in Appendix "C." The Notice published in connection with the adoption of the ordinance

is reproduced in its actual size as Appendix "D."

STATEMENT

Petitioner, a business owner in the city of Tampa, Florida was charged with violating a municipal ordinance that allegedly made his business establishment a non-conforming use after it had been in existence for several years prior to the adoption of the ordinance. Even though there was absolutely no debate that the ordinance was *not* adopted in compliance with strict statutory requirements, the Petitioner was convicted, sentenced, and incarcerated for violating the legally void ordinance. After exhausting his state court remedies, the Petitioner filed for a writ of *habeas corpus* in the district court. The district court dismissed the petition and declined to issue a certificate of probable cause. The court of appeals also declined to issue a certificate of probable cause, clearly in conflict with several decisions from this Court and the circuit courts.

A. Factual Background

Petitioner, Joseph Redner, was the owner and operator of a commercial establishment within the jurisdictional limits of the City of Tampa, Florida. In 1982, the City of Tampa attempted to adopt new zoning regulations (Ordinance 8068-A) which restricted the location of commercial establishments deemed to be "adult uses" throughout the City. Redner's business was defined by Ordinance 8068-A as a "special cabaret". The establishment offered expressive dance performances in

which the dancer sometimes performed unencumbered by any clothing, with the intent of conveying a message, through the medium of dance, of physical attractiveness, eroticism, and the interest in human sexuality possessed by all human beings. These expressive dance performances were protected by the First Amendment to the Constitution of the United States.

Ordinance 8068-A rezoned private real property within the definitions of Florida law, and substantially changed permitted uses in zoning districts. Ordinance 8068-A also applied to more than five percent (5%) of the geographic land area of the City of Tampa. Included in Ordinance 8068-A were provisions restricting the location of business deemed to be "adult uses." Because Redner's establishment was theoretically made non-conforming by the application of the ordinance, Redner's continued exercise of his chosen use of the private property upon which his business was located resulted in charges and convictions of maintaining a special cabaret in violation of Ordinance 8068-A.

The enactment of municipal zoning ordinances was governed by Chapter 166, Florida Statutes. Ordinance 8068-A, by virtue of the fact that it affected all land in the City of Tampa, and placed specific setback requirements and use restrictions on all property which might have been contemplated as a potential location for an adult use, far exceeded the five percent (5%) of total land area characteristic which triggered the statutory requirements of strict compliance with the enactment procedures set forth

in §166.041(3)(c), Florida Statutes (1981). It was well settled that zoning ordinances such as 8068-A must comply with the notice and hearing requirements mandated by the legislature in §166.041(3)(c), or else they were entirely void. The relevant provisions of that section are set forth in Appendix "B." They include the specific notice advertisement requirements, specific language to be included in the advertisements, the time frame for publishing such notices, and the time frame for holding public hearings.

Instead of complying with the essential requirements of the law, it is undisputed that, in its attempt to adopt Ordinance 8068-A, the City of Tampa:

a) did not hold two advertised public hearings on the proposed ordinance;

b) did not hold any hearings after 5:00 p.m. on a weekday;

c) did not comply with the approximate seven-day notice requirement for the first public hearing;

d) never held any second hearing, advertised any such hearing, nor announced the day, time, and place of any such second hearing at the first public hearing;

e) did not comply with the page size, type size, or locational requirement for the advertisement of any public hearing;

f) did not give notice in the form required by § 166.041 (3)(c), Florida Statutes; and

g) advertised notice of zoning Ordinance 8068-A in a small, legal advertisement, not in the

prescribed form, published in *The Tampa Tribune* on September 23, 1982, seven days **after** the only public hearing on Ordinance 8068-A.

The City of Tampa began enforcement of Ordinance 8068-A when its alleged amortization period expired on October 1, 1987. Redner's business allegedly became a non-conforming adult use and, shortly after October 1, 1987, the City of Tampa actually brought criminal charges against Redner and others associated with adult uses allegedly made non-conforming pursuant to Ordinance 8068-A. As a result of the enforcement of this void ordinance, Redner was charged, convicted and punished.

B. Proceedings Below

Prior to any federal consideration of this action, the Petitioner diligently exhausted all state court remedies available to him. Prior to trial, a multi-part Motion to Dismiss was filed by the several Defendants pursuant to Rules 3.190(c), and 3.190(c)(4), Fla.R.Crim.P., challenging the Ordinance on the basis of improper adoption of Ordinance 8068-A, and other significant Constitutional, substantive, and procedural deficiencies in the Ordinance. All aspects to the Motion to Dismiss were denied.

After proceeding to trial, Redner was convicted of a criminal violation of Ordinance 8068-A, and sentenced to probation. The City of Tampa subsequently asserted that

probation was not an available punishment for violation of municipal ordinances, and Redner's sentence was modified to a term of imprisonment for 90 days in the Hillsborough County Jail.[1]

Redner unsuccessfully appealed the various determinations of the trial court to the Hillsborough County Circuit Court, sitting in its appellate capacity, and then sought certiorari review of the Circuit Court's affirmance in Florida's Second District Court of Appeals, which also denied him relief. Redner subsequently filed a Petition for a Writ of *Habeas Corpus* in the state court system, and the requisite exhaustion of a Motion to Vacate Sentence was addressed to the trial court, pursuant to Rule 3.850, Fla.R.Crim.P. None of these forums afforded Redner any relief, with all pertinent actions being dismissed or denied. On January 15, 1992, Redner began serving his sentence of 90 days in the Hillsborough County Jail.

Parenthetically, during the pendency of the criminal proceedings under Ordinance 8068-A, the City of Tampa attempted to repeal that ordinance and incorporate new Adult Use Zoning Regulations into a new Zoning Code -

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[1] In this part of the proceedings before the trial court, REDNER argued that violations of municipal ordinances could not be punished with imprisonment. Although this issue was argued in subsequent state court appellate procedures, it was not addressed by the State Courts. Subsequently, on January 7, 1993, the Florida Supreme Court issued its opinion in *Thomas v. State*, 16 FLW S 46 (Fla. 1993), holding that Florida law was unclear as to whether a violation of a municipal ordinance could result in imprisonment.

Ordinance 8482-A. Redner was also charged and convicted for the same alleged zoning violations at issue in the instant case, however, based on precisely the same statutory adoption infirmities argued herein, the adult use zoning regulations adopted in Ordinance 8482-A were found to be improperly adopted. Charges against Redner under those regulations were ordered dismissed. *Redner v. City of Tampa*, 48 Fla.Supp.2d 69, Hillsborough County Circuit Court, 1991; *cert. denied*, 597 So.2d 305 (Fla. 2d DCA 1991).[2] This opinion, dealing with almost identical legislation and based specifically on alleged infirmities under F.S. § 166.041(3)(c), the identical issue in the instant case, is reprinted as Appendix "L."

With his state court remedies exhausted, Redner filed his Petition for a Writ of *Habeas Corpus* in the United States District Court, alleging that the undisputed failure of the City of Tampa to properly adopt Ordinance 8068-A deprived Redner of procedural due process of law, in violation of the Fifth and Fourteenth Amendment to the Constitution of the United States, thus resulting in a clear denial of a federal right. The Petition was Dismissed (Appendix "I") and a Motion for Reconsideration was

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[2] Redner also succeeded in invalidating the Pinellas County and Hillsborough County Adult Use Ordinances, for the failure of those local governments to provide procedural due process in the adoption of those Ordinances: *Pinellas County v. Redner*, (Pinellas County Circuit Case No. 88-7991 CI, unpublished, 1988); *aff'd, per curiam*, 536 So.2d 249 (Fla. 2d DCA 1988); and *Redner v. State*, 47 Fla.Supp.2d 76 (Hillsborough County Circuit Court, 1991); *cert. denied*, 591 So.2d 190 (Fla. 2d DCA 1991).

Denied (Appendix "H", as endorsed). The district court declined to issue a Certificate of Probable Cause (Appendix "G"). An appeal was taken to the Eleventh Circuit Court on Application for Certificate of Probable Cause. The Application was denied on September 9, 1993 (Appendix "F"), and a subsequent Motion for Reconsideration was denied on February 3, 1994 (Appendix "E").

Of particular note is the fact that, while the case was pending in the Eleventh Circuit, a case presenting the identical substantive issue (procedural due process under Florida's statutory ordinance adoption requirements) was also pending before that Court: *First Assembly of God of Naples, Florida, Inc. v. Collier County*, Case No. 93-2399. The only distinction between the instant case and the *First Assembly* case was that the instant case emanated from a habeas corpus action, thus requiring the Certificate of Probable Cause for further review. A motion to consolidate the two actions was filed, however, the motion was denied and the Petitioner herein was stymied, while the same issue in *First Assembly* continued to be entertained by the court.

The question presented here is whether the Federal Courts properly denied the issuance of a certificate of probable cause pursuant to 28 U.S.C. §2253, when there was the clear showing of the denial of a federal right and that, at the very least, the issues were debatable among jurists of reason, a course of action clearly in conflict with *Barefoot v Estelle*, 463 U.S. 880, 77 L.Ed 2d 1090, 103

jurists of reason, a course of action clearly in conflict with *Barefoot v Estelle*, 463 U.S. 880, 77 L.Ed 2d 1090, 103 S.Ct 3383, 13 Fed Rules Evid Serv 449, reh den (1983) 464 U.S, 874, 78 L.Ed 2d 185, 104 S.Ct 209 (1983), and clearly repugnant to the other decisions of this Court and other federal courts.

REASONS FOR GRANTING THE PETITION

I.

THE DENIAL OF THE CERTIFICATE OF PROBABLE CAUSE CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEALS AND INVOLVES AN ISSUE OF CRITICAL CONSTITUTIONAL IMPORTANCE.

A. The Petitioner Met the Legal Standards for the Issuance of a Certificate of Probable Cause.

The Petitioner sought the relief of the federal courts because the state court absolutely lacked jurisdiction to enforce a void ordinance. Relief evaded him. The procedure for habeas corpus appeals differs from normal civil appeals in an important respect. In habeas corpus, there is no appeal as of right; instead, before a petitioner's appeal will be heard, a district or circuit judge or a Supreme Court justice must issue a "certificate of probable

appellate courts are apparently "without jurisdiction to consider the appeal."[4]

Neither 28 U.S.C. § 2253 nor Fed.R.App.P. 22(b), the two sources of the certificate of probable cause requirement, offer any guidance on the standard a petitioner must meet in order to require issuance of a certificate of probable cause. The former provision's legislative history, however, makes clear that Congress sought to bar "frivolous" or "groundless appeals" or ones presenting a "fictitious federal question."[5] Eschewing Congress' "not frivolous" formulation, the Court in *Barefoot v. Estelle* preferred to state affirmatively what, on analysis, amounts to the same standard.

To qualify under *Barefoot*, an appeal must raise at least one issue as to which the petitioner makes a "'substantial showing of the denial of [a] federal right.'"

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cert. denied, 439 U.S. 968 (1978); Madison v. Tahash, 359 F.2d 60, 61 (8th Cir. 1966) (*per curiam*).

[4]Fabian v. Reed, 707 F.2d 147, 148 (5th Cir. 1983) (*per curiam*); McKibben v. Hopper, 565 F.2d 1316, 1317 (5th Cir.) (*per curiam*), *cert. denied*, 439 U.S. 968 (1978).

[5]42 CONG. REC. 608 (1908) (statement of Rep. Littlefield). *Accord* H.R. REP. NO. 23, 60th Cong., 1st Sess. pt. 1 (1908) ("purpose of this bill is to correct a very vicious practice of delaying the execution of criminals by *groundless* habeas corpus proceedings and appeals therein taken just before the day set for execution" (emphasis added)). *See also* 28 U.S.C. §1915 ("appeal may not be taken in *forma pauperis* if the trial court certifies in writing that it is not taken in good faith").

To qualify under *Barefoot*, an appeal must raise at least one issue as to which the petitioner makes a "'substantial showing of the denial of [a] federal right.'"[6] In defining the "substantial showing" standard, the Supreme Court admonished district courts that they may not deny applications for probable cause certificates solely because they have already denied the petition on the merits: "'[O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor.'"[7] Rather, a certificate must issue if the appeal presents a "question of some substance, *i.e.* at least one issue (i) that is "'debatable among jurists of reason;'" (ii) "'that a court could resolve in a different manner;'" (iii) that is "'adequate to deserve encouragement to proceed further;'" or (iv) that is not "'squarely foreclosed by statute, rule, or authoritative court decision, or ... [that is not] lacking any factual basis in the record.'"[8]

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[6]Barefoot v. Estelle, *supra*, 463 U.S. at 983 (1983) (quoting Steward v. Beto, 454 F.2d 268, 270 n.2 (5th Cir.). 1971), *cert. denied*, 406 U.S. 925 (1972).

[7]Barefoot v. Estelle, *supra*, 463 U.S. at 893 n.4 (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). *See e.g.* Graham v. Lynaugh, 854 F.2d 715 (5th Cir. 1988).

[8]Barefoot v. Estelle, *supra*, 463 U.S. at 893 n.4, 894 (quoting White v. Florida, 458 U.S. 1301, 1302 (1982) (Powell, Circuit Justice, in chambers); Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). *See e.g.*, Autry v. Estelle, 464 U.S. 1301, 1302 (1983) (White, Circuit J., in chambers) (certificate required if "cannot say that the issue lacks substance"); Johnson v. Gramley, 929 F.2d 350, 351 (7th Cir. 1991) (although there is "tension between dismissing a suit as frivolous [pursuant to Rule 4 of the Rules Governing § 2254 Cases] and

Even though the Petitioner's case involves the mere violation of a municipal ordinance and certainly does not rise to the level of the capital cases that the "certificate of probable cause" issue most often arises in, this Court's evaluation should be gauged on "(T)he character of the right, not of the limitation, which determines what standard governs the choice." *Thomas v. Collins*, 323 U.S. 516 at 528 (1945). The clear denial of due process that resulted from the conviction and subsequent imprisonment for the alleged violation of a municipal ordinance that was clearly *void*, unquestionably satisfies the "substantial showing of the denial of a federal right". Although the Petitioner would submit that his position is "undebatable", the fact that so many courts have clearly overlooked his right to relief creates at least one issue that is "debatable among jurists of reason".

The substantial authority cited herein which unequivocally shows that the failure to follow strict statutory requirements in the adoption of the municipal ordinances, shows "that a court could resolve (this issue) in a different manner," and, indeed, on almost every occasion, has done just that. In light of the purpose of the "Great Writ", that being the imperative of correcting a fundamentally unjust result, it is clear that the Petitioner should not be foreclosed by any statute, rule, or

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reversing that court"); Buxton v. Collins, 925 F.2d 816, 819 (5th Cir.), *cert. denied*, 111 S. Ct. 1095 (1991) ("any doubts whether [a certificate or probable cause]...should be issued are to be resolved in favor of the petitioner").

authoritative court decision from correcting the miscarriage of justice that has been repeatedly, frustratingly and frighteningly occasioned upon him.

There is *absolutely* no dispute whatsoever that Ordinance 8068-A was *not* adopted in compliance with Florida Statute §166.041(3)(c). Because of this undisputed fact, Ordinance 8068-A is *void*, and this lacks no factual basis in the record.

Because this Court has decided numerous cases which are directly in conflict with the apparent misguided rationale behind the denial of the issuance of the certificate of probable cause, and the same issue has been repeatedly decided consistently with the Petitioner's position, the writ should be granted. This is further justified by the fact that the identical issue is pending on appeal in the Eleventh Circuit in the case of *First Assembly of God of Naples, Florida, Inc. V. Collier County*, Case No. 93-2399 (seeking review of the district court decision *First Assembly of God of Naples, Florida v. Collier County*, 775 F.Supp 383 [M.D. Fla. 1991]). Since this *exact* issue has been resolved favorably to other petitioners by state courts, district judges in other districts, and panels in other circuits, this case clearly deserves review by this Court.

Even though Redner has completed the punishment imposed by his state court sentence and is no longer incarcerated, he continues to suffer the adverse effects of his conviction, and is subjected to further restraints on his liberty as a result of this wrongful conviction. Redner maintains that he has standing to carry through on the

instant petition, and continues in the attempt to vindicate his rights for the punishment he received through the application of the improperly adopted and void ordinance.

B. Punishment Based on Void Legislation is a Denial of Due Process Rights and is Clearly the "Substantial Showing of the Denial of a Federal Right Necessary for the Issuance of a Certificate of Probable Cause".

Throughout the administration of the lower actions, the Petitioner consistently challenged the sufficiency of the due process afforded him as a result of the improper methods utilized by the City in adopting Ordinance 8068-A. Because of the fundamental nature of the enactment procedures required by the Florida Statutes for zoning ordinances, it is clear that any failure to comply with these statutory requirements results in *void* legislation and clearly indicates that any action taken under the auspices of such legislation is a denial of due process.

The Florida legislature has mandated the very strict due process requirements (Appendix "B") for the enactment of zoning ordinances, such as Ordinance 8068-A. These due process requirements, as embodied in § 166.041(3)(c), F.S., were clearly the result of a reasoned determination that any legislation imposed by the government restricting the ability of a free citizen to use private property in the manner deemed appropriate by the owner, must be the product of an adoption process with adequate procedural safeguards and a full and fair opportunity for any affected citizen to be heard. They become due process

requirements, and as such, also come under the umbrella of the Federal Constitution, as set out *infra*.

Because this action involves a writ of *habeas corpus* and the attendant certificate of probable cause required for any review of the denial of such writ, proper evaluation of the purpose of the writ of *habeas corpus*, frequently elaborated upon by this Court, is appropriate:

> "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and **lawless** state action. Its pre-eminent role is recognized by the admonition in the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended. U.S. Const. Art I., § 9, cl. 2. **The scope and flexibility of the writ** -- its capacity to reach all manner of illegal detention -- **its ability to cut through barriers of form and procedural mazes -- have always been emphasized and jealously guarded by courts and lawmakers.** The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." [Emphasis added] *Harris v. Nelson*, 394 U.S. 286, 291; 89 S.Ct. 1082, 1086 (1968).

> "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and the he

is deprived of his freedom contrary to law. ..." *Id.* at 292, 89 S.Ct. 1086-87.

Because of the complex and intricate state and federal procedural issues in the instant case, it must be stressed that the concepts of fundamental fairness and an "overall inquiry into justice" be the primary concerns of this Court. You have held:

> "However, as we also noted in *Engle* [*v. Isaac* 456 U.S. 107, 102 S.Ct. 1558 (1982)], '(i)n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice **'must yield to the imperative of correcting a fundamentally unjust incarceration.'** 456 U.S. at 135, 102 S.Ct. at 1576. We remain confident that, for the most part, victims of a fundamental miscarriage of justice will meet the cause and prejudice standard.' *Ibid.* But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default." [Emphasis added] *Murray v. Carrier*, 477 U.S. 478, 492-97, 106 S.Ct. 2639, 2648-49, 91 L.Ed.2d 397 (1986).

In the instant case, the Petitioner was the victim of a fundamentally unjust incarceration, because there was no valid ordinance to base his conviction on. He is still presently suffering the adverse effects of his conviction and

detention. The actions of the City of Tampa were "lawless" in that the City failed to give proper notice and hold the required hearings in the adoption of Ordinance 8068-A. The failure of the City of Tampa to comply with the statutory requirements mandated for the adoption of zoning ordinances in the enactment of Ordinance 8068-A, and to hold the required hearings, constituted **fundamental error**. *Skaggs v. City of Key West*, 312 So.2d 549 (Fla. 3d DCA 1975). Thus, any incarceration was fundamentally unjust, and the petition for a writ of *habeas corpus* was improperly dismissed by the district court. This error was further compounded by the failure to issue the certificate of probable cause.

The Report and Recommendation issued by the Magistrate and adopted by the District Court (Appendix "K") stated that the Petitioner's claim presented only issues of state law and thus did not support federal habeas relief. Citing *Estelle v. McGuire*, 112 S.Ct 475 (1991), the Magistrate Judge clearly overlooked the plain statement "We hold that none of the alleged errors arise to the level of a *due process* violation." *Id.* at 479. Petitioner would submit that the enforcement of void legislation violates the Constitution under the Fifth and Fourteenth Amendments, *and has been consistently held to specifically be a violation of due process*, and thus clearly justifies federal habeas relief. This is clearly supported by the fact that the federal courts have looked specifically to F.S. § 166.041(3)(c) in reaching other decisions. See *Southern Entertainment Company of Florida, Inc. v. City of Boynton Beach*, 736

F.Supp. 1094 (S.D. Fla. 1990).

In the instant case, it is abundantly clear that the Petitioner was detained without authority of, and contrary to the law, as the ordinance pursuant to which he was punished was improperly adopted and null and void *ab initio*. This determination has been consistently upheld by the Florida courts as well as federal courts. With respect to zoning/land use cases, and in accordance with the legal and fundamentally fair requirement for a hearing consistent with the Due Process Clause, numerous Florida cases have held zoning ordinances to be invalid if not properly enacted.[9] The most succinct statement on this subject is the following:

> "First, the city's purported amendment is not voidable -- it is void. *Daytona Leisure Corp. v. Daytona Beach*, 539 So.2d 597 (Fla. 5th DCA 1989). The city had no authority to enact the ordinance without complying with the statutorily

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[9] *e.g. David v. City of Dunedin*, 476 So.2d 304 (Fla. 2d DCA 1985); *Fountain v. City of Jacksonville*, 447 So.2d 353 (Fla. 1st DCA 1984); *City of Hollywood v. Rix*, 52 So.2d 135 (Fla. 1951); *City of Hollywood v. Petersen*, 178 So.2d 919 (Fla. 2d DCA 1965); *Knowles v. Town of Kenneth City*, 247 So.2d 748 (Fla. 2d DCA 1971); *Ellison v. City of Fort Lauderdale*, 183 So.2d 193 (Fla. 1966); *Daytona Leisure Corp. v. Daytona Beach*, 539 So.2d 597 (Fla. 5th DCA 1989); *City of Sanibel v. Buntrock*, 409 So.2d 1073 (Fla. 2d DCA 1982); *Bal Harbour Village v. State*, 299 So.2d 611 (Fla. 3d DCA 1974); *Bhoola v. City of St. Augustine Beach*, 588 So.2d 666 (Fla. 5th DCA, 1991); *Josephson v. Autrey*, 96 So.2d 784 (Fla. 1957); *Renard v. Dade County*, 261 So.2d 832 (Fla. 1972); and, in Georgia, *Whidden v. Faigen*, 255 Ga. 347, 338 S.E.2d 264 (Ga. 1986).

mandated notice and public hearings requirements. It is as though the ordinance does not exist." *Bhoola v. City of St. Augustine Beach*, 588 So.2d 666 (Fla. 5th DCA 1991).

The federal courts have also invalidated zoning ordinances for failure of the local government to properly enact them:

"The statute states that *before* an amendment is put into effect, a public hearing shall be held *thereon*. ... Before another proposal could be adopted, a notice and hearing relating to it were required under the plain terms of the statute. [Citations omitted]

"The hearing on the rejected amendment cannot be treated as an acceptable substitute for the required hearing, since the amendment ... represented a major and substantial change from the proposed amendment. ... The proposal was so fundamentally changed that a public hearing was required before amendment embodying the change could validly be adopted. This is the uniform holding under comparable statutes. *See, e.g., Fish v. Town of Canton*, 1948, 322 Mass. 219, 77 N.E. 2d 231; *Village of Sands Point v. Sands Point Country Day School*, 1955, 2 Misc. 2d 885, 148 N.Y.S.2d, 316, affirmed, 1956, 2 A.D.2d 769, 154 N.Y.S.2d 428; cf. *State ex rel. Kling v. Nielsen*, 1957, 103 Ohio App.60, 144 N.E.2d 278. [Footnote omitted] ..." [Emphasis by the Court] *Castle v. McLaughlin*, 270 F.2d 448 (D.C. Cir. 1959).

"In light of the foregoing, the Court finds that failure to satisfy the notice and approval requirements of the zoning ordinance renders the resolution ... to repeal the campaign sign ordinance ineffective." *Martin v. Wray*, 473 F.Supp. 1131 (E.D. Wis. 1979).

Several of the Florida zoning enactment cases properly identify the nature of the notice and hearing requirements of §166.041(3)(c), the statutory requirements for municipalities such as the City of Tampa, as fundamental due process requirements:

" '... **Procedural due process** is afforded if an affected party has an opportunity to be heard at any time before a decision is reached by the county governing authority.' 196 S.E.2d at 144" [Emphasis added] *City of Fort Lauderdale v. Gulf & Eastern Development Corporation*, 322 So.2d 88 (Fla. 4th DCA 1976) affirmed, *Gulf & Eastern Development Corporation v. City of Fort Lauderdale*, 354 So.2d 57 (Fla. 1978).

A more recent Florida First District Court of Appeal case stated:

"The **concept of due process** contemplates that before constitutionally recognized rights of life, liberty and property are infringed upon, the individuals having such rights must be given reasonable notice of the proposed action and an opportunity to appear and to be heard on the issue. ... Because the 'extent of **procedural due process protections** varies with the character of the interest

and nature of the proceeding involved' it has been recognized that there is 'no single, unchanging test which may be applied to determine **whether the requirements of procedural due process have been met**.' *Hadley v. Department of Administration*, 411 So.2d 184, 187 (Fla. 1982). Accordingly, the task of determining 'by what process and procedure legal rights may be asserted and determined provided that the procedure adopted affords reasonable notice and a fair opportunity to be heard before rights are decided' **is left to the legislature**. *Peoples Bank of Indian River County v. State, Department of Banking and Finance*, 395 So.2d 521, 524 (Fla. 1981)." [Emphasis added] *Friends of Everglades v. Board of County Commissioners*, 456 So.2d 904, 910-11 (Fla. 1st DCA 1984).

In the case of the enactment of zoning ordinances, the Florida legislature has mandated the procedural requirements of § 166.041(3)(c), and those requirements are thus the minimum standard acceptable under the Due Process Clause.

As a zoning ordinance, Ordinance 8068-A impairs property rights guaranteed by the Fifth Amendment to the Constitution of the United States:

"Building zone laws are of modern origin. . . . But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, **statutes and ordinances, which after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course,**

must fall." [*Italic* emphasis by the Court; **bold** emphasis added] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365,386-7,47 S.Ct. 114,118 (1926).

Even though relief is sought in a federal forum for the failure to comply with state due process requirements, concerns about federalism do not, in any way, inhibit the maintenance of this action. The relief sought herein, just as the relief sought in the district and circuit courts, is entirely proper:

> "... Our recent cases have thoroughly rejected the *Ways* [*v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937)] notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.' **Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,'** *Duncan v. Louisiana*, [391 U.S. 145,] at 149, 88 S.Ct. at 1447, **the same constitutional standards apply against both the State and Federal Governments**..." [Emphasis added] *Benton v. Maryland*, 395 U.S. 784, 795, 89 S.Ct. 2056, 2063 (1969).

Critical to the Petitioner's position in this case is the doctrine that property, liberty, and similar interests protected by the Fourteenth Amendment to the Constitution of the United States, are created by a variety of sources, including independent sources such as state law, rules, or understandings. *Roth v. Board of Regents*, 408 U.S. 564,

92 S.Ct. 2701, 33 L.Ed.2d 548, (1972):

> "Property interests of course, are not created by the Constitution. Rather, they are created **and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or benefits that secure certain benefits and that support claims of entitlement to those benefits**. ..." [Emphasis added] *Id.* at 577, 92 S.Ct. at 2709.

Various circuit courts of appeal have analyzed this issue, and have found:

> "... The [Supreme] Court said it is the **alteration or extinguishing of a right or status previously recognized by state law that invokes the procedural guarantees contained in the due process clause**. [*Paul v. Davis*, 424 U.S. 693] at 711, 96 S.Ct. 1155 [(1976)]." [Emphasis added] *Medina v. Burrdman*, 545 F.2d 244, 250 (1st Cir. 1976).

> "The analysis for determining whether the state law has granted a protected property interest parallels the analysis for determining whether state law has granted a liberty interest. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974); *Walker v. Hughes*, 558 F.2d 1247, 1255 (6th Cir. 1977).

Florida placed substantive limitations on the ability of its local governments to enact zoning ordinances by establishing the particularized standards of § 166.041(3)(c),

thereby bringing the adoption of zoning ordinances under the mandates of the Due Process Clause. By analogy, the courts have shown a special sensitivity to a state's creation of protected property interests:

> "... But interests protected by the Fifth Amendment need not be, and in fact often are not, grounded in federal statutory law. ..." *Young v. U.S.* 498 F.2d 1211, 1219 (5th Cir. 1974).

> "... Further, a state-created liberty interest may originate in a state statute or in regulations or in the practices of state or county officials. *Vitek v. Jones*, 445 U.S. [480] at 489-90, 100 S.Ct. [1254] at 1261-62; *Dudley v. Stewart*, 11 Cir. 1984, 724 F.2d at 1497-98; *Parker v. Cook*, 642 F.2d at 876-77. Our inquiry, therefore, must be whether the State of Alabama, **by statute, regulation or practice created a liberty interest** in the plaintiff's continued participation in the Alabama work release program that could not properly be revoked without due process of law." *Whitehorn v. Harrelson*, 758 F.2d 1416, 1422 (11th Cir. 1985).

> **"On the other hand, procedural due process claims involve those expectations created by state law."** [Emphasis added] *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791, 794 (11th Cir. 1987).

> "The Due Process Clause also encompasses a third type of protection, a guarantee of **fair procedure**. ... In procedural due process claims, the deprivation by state action of a constitutionally

> protected interest in 'life, liberty or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such interest *without due process of law. Parratt* [*v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981)] 451 U.S. at 537, 101 S.Ct. at 1913; *Carey v. Piphus*, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050, 55 L.Ed.2d 252 (1978). ... Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask **what process the State provided, and whether it was constitutionally adequate. The inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation**, and any remedies for erroneous deprivations provided by statute or tort law." [*Italic* emphasis by the Court; **Bold** emphasis added] *Zinermon v. Burch*, _____ U.S. _____, 110 S.Ct. 975, 983 (1990).

> "... **Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with procedures established in the state constitution and statutes for the enactment of legislation.** ..." [Emphasis added] *Richardson v. Town of Eastover*, 922 F.2d 1152 (4th Cir. 1991).

Municipal ordinances such as the City of Tampa's Ordinance 8068-A are adopted under authority of state law, and constitute state action within the dictates of the Fourteenth Amendment: *Lovell v. Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 164 (6th Cir. 1973). The Constitutional sufficiency of the notice and hearing provided is a matter of law; *McGhee v. Draper*,

639 F.2d 639, 643 (10th Cir. 1981).

In this case, the City of Tampa failed to comply with the mandatory statutory requirements of § 166.041(3)(c), to furnish adequate notice or hold appropriate hearings in the adoption of Ordinance 8068-A. This failure constituted improper state action impairing fundamental rights protected by the Fifth and Fourteenth Amendment. This denial of due process rendered the enactment of the ordinance Constitutionally invalid and the ordinance fundamentally void.

Because of the improper procedural methods used in the adoption of the ordinance under which the Petitioner was convicted and punished, the Petitioner's punishment was clearly without the authority of the law, and contrary to the Constitution of the United States. Therefore, federal *habeas corpus* relief was appropriate, as was issuance of the certificate of probable cause.

CONCLUSION

The Petitioner was convicted and incarcerated of a violation of Ordinance 8068-A. Under any definition, this ordinance was a zoning ordinance as contemplated by the laws of the State of Florida. The enactment of zoning ordinances, under Florida law, is governed by the strict notice and hearing requirements of §166.041(3)(c), Florida Statutes. Both Florida and federal law have clearly established that any failure to strictly follow the notice and hearing requirements of enabling legislation results in an

ordinance which is not only void *ab initio*, but is also a denial of due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. This denial of due process results in void legislation and renders any enforcement of that legislation "unlawful."

The purpose of a Writ of *Habeas Corpus* is to provide an instrument for safeguarding individual freedom against arbitrary and lawless state action. Because the Petitioner was subjected to the unlawful enforcement of a void zoning ordinance, both his conviction and incarceration resulted in unlawful confinement and a deprivation of freedom, contrary to the law. The Petition for Writ of *Habeas Corpus* filed in the district court should have been granted, and, at the very least, the issuance of a certificate of probable cause was clearly appropriate. In recognition that the nature of the writ is to ensure that miscarriages of justice within its reach are identified and corrected, in addition to the fact that the decisions of the lower federal courts plainly conflict with well settled precedent established by this Court and the courts of appeals, this Petition should be granted.

Respectfully submitted,

Luke Charles Lirot
Counsel for Petitioner

DATED May 20, 1994

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Appendix "A"	Order granting enlargement of time to file a Petition for a Writ of Certiorari
Appendix "B"	Florida Statute § 166.041(3)(c)(1981)
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Appendix "E"	Order Denying Motion for Reconsideration entered February 3, 1994
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APPENDIX A

SUPREME COURT OF THE UNITED STATES

No.

A-904

Joseph Richard Redner,

Petitioner

v.

Cal Henderson, etc., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 20, 1994.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

APPENDIX B

Florida Statute § 166.041(3)(c)

"(c) Enactment of ordinances initiated by the governing body or its designee which rezone private real property shall be enacted pursuant to the following procedures:"...

"2. In cases in which the proposed ordinance deals with more than 5 percent of the total land area of the municipality, the governing body shall provide for public notice and hearings as follows:

"a. The local governing body shall hold two advertised public hearings on the proposed ordinance. Both hearings shall be held after 5 p.m. on a weekday, and the first shall be held approximately 7 days after the day that the first advertisement is published. The second hearing shall be held approximately 2 weeks after the first hearing and shall be advertised approximately 5 days prior to the public hearing. The day, time, and place at which the second public hearing will be held shall be announced at the first public hearing.

"b. The required advertisements shall be no less than one-quarter page in a standard size or tabloid size newspaper, and the headline in the advertisement shall be in type no smaller than 18 point. The advertisement shall not be placed in that portion of the newspaper where legal notices and classified advertisements appear. The advertisement shall be published in a newspaper of general paid

circulation in the municipality and of general interest and readership in the community, not one of limited subject matter, pursuant to chapter 50. It is the legislative intent that, whenever possible, the advertisement shall appear in a newspaper that is published at least 5 days a week unless the only newspaper in the community is published less than 5 days a week. The advertisement shall be in the following form:

"NOTICE OF ZONING
(PERMITTED USE)
CHANGE

"The _____ proposes to rezoned (change the permitted use of) the land within the area shown in the map in this advertisement.

"A public hearing on the rezoning will be held on _____ at _____.

"The advertisement shall also contain a geographic location map which clearly indicates the area covered by the proposed ordinance. The map shall include major street names as a means of identification of the area." § 166.041 (3)(c), F.S., 1981.

APPENDIX C

3068-A

AN ORDINANCE AMENDING CHAPTER 43, CITY OF TAMPA CODE, AND MORE SPECIFICALLY SECTION 43-1 AND 43-31, DEFINING ADULT BOOKSTORES, ADULT THEATERS, AND SPECIAL CABARETS, DEFINING SPECIFIED SEXUAL ACTIVITIES AND SPECIFIED ANATOMICAL AREAS; PROVIDING FOR CRITERIA FOR THE LOCATION OF ADULT BOOKSTORES, ADULT THEATERS, AND SPECIAL CABARETS; PROVIDING FOR THE WAIVER OF LOCATIONAL PROVISIONS; PROVIDING FOR THE ESTABLISHMENT AND CONTROL OF NON-CONFORMING ADULT BOOKSTORES, ADULT THEATERS, OR SPECIAL CABARETS; ESTABLISHING ADULT BOOKSTORES, ADULT THEATERS, AND SPECIAL CABARETS AS A PERMITTED USE WITHIN THE C-2 GENERAL COMMERCIAL DISTRICT; REPEALING ALL ORDINANCES IN CONFLICT HEREWITH; PROVIDING AND EFFECTIVE DATE HEREOF.

WHEREAS, it has been demonstrated that the establishment of adult businesses in commercial district, which are immediately adjacent to and which serve residential neighborhoods, has a deleterious effect on both the commercial and residential segments of the neighborhood, causing blight and a downgrading of property values, and

WHEREAS, the prohibition against the establishment of more than one regulated use within one thousand feet of another regulated use will serve to avoid the clustering or concentration of certain businesses which when located in close proximity to each other tends to create a "skid row" atmosphere, and tends to exacerbate the blighting and devaluation of adjacent property values, and

WHEREAS, the presently existing Chapter 43, City of Tampa Code, does not provide for such regulation of the location of adult bookstores, adult theaters, and special cabarets,

WHEREAS, concern for and pride in the orderly planning and development of a neighborhood should be encouraged and fostered in those persons who comprise the commercial and residential segments of those neighborhoods, and

WHEREAS, public hearings have been called to permit all citizens and interested parties to be heard with reference to the proposed ordinance, and

WHEREAS, the Hillsborough County Planning Commission has made recommendations on the proposed ordinance, and

WHEREAS, testimony or documents or both have been received from the City of Tampa Police Department, various other City departments, as well as

numerous other expert and lay witnesses interested in this proposed ordinance, and

WHEREAS, it is in the best interest of all the citizens of the City of Tampa, that adult businesses, as herein defined, be located no closer than 500 feet to a residentially zoned district, and that such establishments not be concentrated with more than one such establishment in any given 1000-foot distance, in order to avoid the blighting and downgrading of the surrounding neighborhoods, now, therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TAMPA, FLORIDA:

Section 1. That Chapter 43, City of Tampa Code, and more specifically, Section 43-1, is hereby amended to include the following definitions in their appropriate alphabetical order:

> "Adult bookstore. An establishment having as a substantial or significant portion of its stock in trade, books, magazines, films, videotapes, newspapers, photographs, paintings, drawings, or other publications or graphic media, which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to 'specified sexual activities' or 'specified anatomical areas', as defined in this chapter, or an establishment with a

segment or section devoted to the sale or display of such material."

"Adult theater. An enclosed building or an enclosed space within a building used for presenting either filmed, videotaped, or live plays, dances, or other performances, either by individuals or groups, distinguished or characterized by an emphasis on material depicting, describing, or relating to 'specified anatomical areas' as defined in this chapter for observation by patrons therein."

"Special cabarets. Any bar, dance hall, or other place of business at which food or beverages, alcoholic or non-alcoholic, are served which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers, or any such establishment the advertising for, or a sign or signs identifying which, use the words 'adult', 'topless', 'nude', or other words of similar import.

"Specified sexual activities.

(1) Human genitals in a state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse, or sodomy, whether actual or simulated;

(3) Fondling or other erotic touching of human genitals, pubic region, buttock, or female breast."

"Specified anatomical areas.

(1) Less than completely and opaquely covered:

(a) Human genitals or pubic region;

(b) Buttock;

(c) Female breasts below a point immediately above the top of the areola.

(2) Human male genitals in a discernably turgid state, even if completely and opaquely covered."

Section 2. That Section 43-31, City of Tampa Code, be created to read as follows:

"Sec. 43-31. Adult bookstores, adult theaters, and special cabarets.

(A) Location.

(1) It shall be unlawful to locate any adult bookstore, adult theater, or special cabaret, within 500 feet of any area in the City of Tampa zoned R-1, R-1A, R-2, R-3, R-3A, R-3HR, R-4 or R-P.

(2) It shall be unlawful to locate any adult bookstore, adult theater, or special cabaret, within 1000 feet of any other such regulated use.

(3) Distances shall be measured from property line to property line along the shortest distance between property lines without regard to the route of normal travel.

(4) Nothing in this section shall be construed to permit the operation of any business or the performance of any activity prohibited under any other section of this Code.

(B) Waivers. The City Council of the City of Tampa, after studying the recommendation by the Hillsborough County Planning Commission, may waive the locational provisions for adult bookstores, adult theaters, or special cabarets, upon a finding that all of the following requirements have been met:

(1) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of the ordinance will be observed.

(2) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

(3) That the establishment of an additional such regulated use in the area will not be contrary to any program of neighborhood conservation, nor will it interfere with any program of urban revitalization.

(C) Non-conforming adult bookstores, adult theaters, or cabarets. Adult bookstores, adult theaters, or special cabarets which have been lawfully established at their existing locations prior to the effective date of this section, and which are not in conformity with the requirements of this section may continue to operate until October 1, 1987. Thereafter, unless such adult bookstore, adult theater, or special cabaret conforms to the provisions of this section, it shall no longer be permitted to operate. If a non-conforming spacing situation can be eliminated by the abatement of one or more such establishments, the establishment which has been licensed as an adult bookstore, adult theater, or

special cabaret business for the longest total period of time at that same address shall be permitted to remain."

Section 3. That City of Tampa Code, Section 43-23, C-2 general commercial district (A) (29) is created to read as follows:

"(29) Adult bookstores, adult theaters, and special cabarets."

Section 4. That all ordinances and portions of ordinances in conflict herewith are hereby repealed.

Section 5. This Ordinance shall take effect immediately upon becoming a law.

PASSED AND ADOPTED BY THE CITY OF TAMPA, FLORIDA; ON SEPTEMBER 30, 1982.

/s/ Lloyd Copeland
CHAIRMAN, CITY COUNCIL

ATTEST:

/s/ Frances Henriquez
CITY CLERK

APPROVED by me on 10-4-82

/s/ Bob Martinez
MAYOR

Prepared and Approved by:

/s/ Kenneth E. Graves
ASSISTANT CITY ATTORNEY

APPENDIX D

ADVERTISED NOTICE FOR ORDINANCE 8068-A REPRODUCED AT ACTUAL SIZE

8068-A

File EB2-8.C43

AN ORDINANCE AMENDING CHAPTER 43, CITY OF TAMPA CODE, AND MORE SPECIFICALLY SECTION 43-1 AND 43-31; DEFINING ADULT BOOKSTORES, ADULT THEATERS, AND SPECIAL CABARETS; DEFINING SPECIFIED SEXUAL ACTIVITIES AND SPECIFIED ANATOMICAL AREAS; PROVIDING FOR CRITERIA FOR THE LOCATION OF ADULT BOOKSTORES, ADULT THEATERS, AND SPECIAL CABARETS; PROVIDING FOR THE WAIVER OF LOCATIONAL PROVISIONS; PROVIDING FOR THE ESTABLISHMENT AND CONTROL OF NONCONFORMING ADULT BOOKSTORES, ADULT THEATERS, OR SPECIAL CABARETS; ESTABLISHING ADULT BOOKSTORES, ADULT THEATERS, AND SPECIAL CABARETS AS A PERMITTED USE WITHIN THE C-2 GENERAL COMMERCIAL DISTRICT; REPEALING ALL ORDINANCES IN CONFLICT HEREWITH; PROVIDING AN EFFECTIVE DATE HEREOF.

APPENDIX E

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

NO. 92-3194

JOSEPH RICHARD REDNER,

Petitioner-Appellant

versus

WALTER HEINRICH, Sheriff of Hillsborough County, Florida; ROBERT A. BUTTERWORTH, the Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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Before BIRCH, ANDERSON and BLACK, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of this Court's order dated September 29, 1993, denying his application for a certificate of probable cause, is DENIED.

FILED / U.S. COURT OF APPEALS
ELEVENTH CIRCUIT / 2-3-94

APPENDIX F

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

NO. 92-3194

JOSEPH RICHARD REDNER,

Petitioner-Appellant

versus

WALTER HEINRICH, Sheriff of Hillsborough County, Florida; ROBERT A. BUTTERWORTH, the Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ORDER:

Appellant's application for a certificate of probable cause is DENIED.

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

September 29, 1993

David L. Edwards
Clerk, U.S. District Court
611 North Florida Avenue, Room 105
Tampa, FL 33601

RE: 92-3194 Redner v. Heinrich
DC DKT NO.: 92-00103 CIV-T-99

The enclosed certified copy of this Court's order denying the application for a Certificate of Probable Cause is issued in lieu of the mandate of this court.

Please acknowledge receipt by returning the enclosed copy of this letter.

Sincerely,

/s/
MIGUEL J. CORTEZ, Clerk

Reply To: C. Sulzberger (404) 331-3843

Clerk's Note: Enclosed herewith are the original papers, consisting of two (2) volumes.

APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSEPH RICHARD REDNER,

Petitioner,

v. Case No. 92-103-Civ-T-99-B

WALTER R. HEINRICH,
ROBERT BUTTERWORTH,

Respondents.
_____/

ORDER

This cause is before the Court on Petitioner's "Application for Certificate of Probable Cause" (Doc. No. 19).

A state prisoner must obtain a certificate of probable cause to appeal in order to prevent frivolous appeals. *Barefoot v. Estelle*, 463 U.S. 880, 892 (1983); 28 U.S.C. § 2253; Fed.R.App.P. 22(b). To justify the issuance of a certificate of probable cause, Petitioner must do more than show his case is not merely frivolous. *Barefoot*, 463 U.S. at 893. *Barefoot* provides several formulations of petitioner's burden. "This Court should grant an application for a substantial showing that he has been

denied a federal right." *Richardson v. Thigpen*, 883 F.2d 895, 897 (11th Cir.), citing *Barefoot*, 463 U.S. at 893), *cert. denied*, 492 U.S. 934 (1989). To make this substantial showing, Petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could resolve the issues [differently]." *Barefoot*, 463 U.S. at 893 n.4 (citation omitted). Or, he must show "the questions are adequate to deserve encouragement to proceed further." *Id.* Petitioner meets none of the formulations. The requirement of a certificate of probable cause was meant to prevent the present type of petition from proceeding any further. Accordingly, the Court orders:

That Petitioner's "Application for Certificate of Probable Cause" (Doc. No. 19) is denied.

DONE AND ORDERED at Orlando, Florida, this 5th day of August, 1993.

/s/
Anne C. Conway
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSEPH RICHARD REDNER,

Case No. 92-103-Civ-T-99-B

Petitioner,

v.

WALTER R. HEINRICH, Sheriff
of Hillsborough County, Florida,

Respondent,

and

ROBERT BUTTERWORTH, the Attorney
General of the State of Florida,

Additional Respondent.

_____/

MOTION FOR RECONSIDERATION
WITH MEMORANDUM OF LAW

ORDER: This motion/petition/application has been duly considered and is hereby DENIED this 5th day of November, 1992.

/s/ Anne C. Conway
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSEPH RICHARD REDNER,	:	
Petitioner,	:	
v.	:	Case No.:
	:	92-103-Civ-T-99-B
WALTER R. HEINRICH, Sheriff of Hillsborough County, Florida,	:	
Respondent,	:	
and	:	
ROBERT BUTTERWORTH, the Attorney General of the State of Florida,	:	
Additional Respondent.	:	

ORDER

THIS CAUSE came on for consideration upon the filing of a petition for writ of habeas corpus by a state prisoner, JOSEPH RICHARD REDNER.

This matter was considered by the United States Magistrate Judge pursuant to the general order of assignment, who has filed his report recommending that the case be dismissed.

Upon consideration of the report and recommendation of the Magistrate Judge and upon this court's independent examination of the file, the Magistrate Judge's report and recommendation is adopted and confirmed and made a part hereof, and it is

ORDERED:

1. That this case is hereby DISMISSED.

2. Each party shall bear its own costs.

DONE and ORDERED at Tampa, Florida, this 7th day of April, 1992.

/s/ Anne C. Conway
UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSEPH RICHARD REDNER, Petitioner, v. WALTER R. HEINRICH, Sheriff of Hillsborough County, Florida, Respondent, and ROBERT BUTTERWORTH, the Attorney General of the State of Florida, Additional Respondent.	Case No.: 92-103-Civ-T-99-B

ORDER

This cause came on for consideration upon the Emergency Motion for Stay of State Court Sentence and Alternative Emergency Motion for Release From Custody on Reasonable Bail (Doc. 4), and City of Tampa's Motion for Leave to File an Amicus Curiae Memorandum of Law.

In light of the petitioner's emergency motion, this case was given expeditious consideration. However, upon consideration of the petition, it appears that the petitioner is not entitled to relief. Accordingly the motion for stay of sentence or release on bond is hereby DENIED.

The City of Tampa seeks leave to file an amicus memorandum asserting that it has an interest in the proceeding since it is the city's ordinance that is being challenged. The memorandum was received, however, after the report and recommendation was essentially completed and was not taken into account in its drafting. Thus, to a great extent, the city's motion is moot. nevertheless, the clerk will be directed to file the memorandum and the city may be permitted to be heard in connection with any further proceedings.

IT IS SO ORDERED.

DONE AND ORDERED in Tampa, Florida, this 7th day of February, 1992.

/s/
THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

APPENDIX K

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSEPH RICHARD REDNER,	:	
Petitioner,	:	
v.	:	Case No.:
	:	92-103-Civ-T-99-B
WALTER R. HEINRICH, Sheriff of Hillsborough County, Florida,	:	
Respondent,	:	
and	:	
ROBERT BUTTERWORTH, the Attorney General of the State of Florida,	:	
Additional Respondent.	:	

REPORT AND RECOMMENDATION

This is a habeas corpus action by a prisoner who challenges his conviction for violating a municipal ordinance on the ground that the ordinance was not enacted

in accordance with state law.* Because this claim does not support federal habeas relief, I recommend that the petition be dismissed.

The petitioner was charged in Hillsborough County Court with violating Tampa City Ordinance 8068-A, which relates to adult bookstores, adult theaters, and special cabarets. He was convicted at a non-jury trial of operating a special cabaret in violation of the ordinance. After initially being placed on probation, he was resentenced to 90 days in jail.

The petitioner appealed his conviction to Hillsborough County Circuit Court, but the conviction was affirmed. The petitioner, thereafter, petitioned the Florida Second District Court of Appeal for a writ of certiorari. The petition, however, was denied, as was a motion for rehearing. The petitioner, through counsel, then filed this habeas petition.

The petitioner alleges that his conviction is invalid because the ordinance upon which it was based was not enacted in accordance with the requirements of Fla. Stat. § 166.041 (3) (c). The petitioner asserts that this contention was raised on direct appeal and in the petition for certiorari. This presentation to the state courts would be sufficient, as the petitioner argues, to exhaust his state remedies.

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*This matter comes before the undersigned pursuant to the Standing Order of this court dated August 28, 1987. See also Local Rule 6.02 (c) (17).

The petitioner, however, has confounded the issue of exhaustion by filing in state court, at the same time he filed this petition, a motion to vacate pursuant to Florida Criminal Procedure Rule 3.850. That state-court motion, as indicated, was unnecessary to exhaust the petitioner's state remedies on the claim asserted in this petition. On the other hand, now that the petitioner has filed the Rule 3.850 motion, it provides an avenue by which the state courts could grant relief and thus obviate any need for federal intrusion into the state judicial process. See William v. Bailey, 463 F.2d 247 (5th Cir. 1972). However, there is no reason to struggle with the application of the exhaustion doctrine in this circumstance, since the petitioner's habeas claim is patently groundless. In such a situation, this court is authorized to dismiss the action for lack of merit. Cf. Granberry v. Greer, 481 U.S. 129 (1987).

The petitioner's claim is that the municipal ordinance he violated was not enacted in accordance with Florida statutory requirements. This claim presents only issues of state law and thus does not support federal habeas relief. As the Supreme Court recently reiterated in Estelle v. McGuire, ___ U.S. ___, 60 U.S.L.W. 4015, 4017 (1991) (footnote omitted):

> We have stated many times that "federal habeas corpus relief does not lie for errors of state law." Lewis v. Jeffers, 497 U.S. ___, ___ (1990); see also Pulley v. Harris, 465 U.S. 37, 41 (1984). Today, we reemphasize that it is not the province of a federal habeas court to reexamine state court

> determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. §2241; Rose v. Hodges, 423 U.S. 19, 21 (1975) (per curiam).

The petitioner's challenge to his conviction is plainly grounded upon alleged errors of state law. As indicated, he alleges that the ordinance under which he was convicted is void because its enactment did not comply with Fla. Stat. §166.041 (3) (c). The petitioner thus looks to state law, rather than to the United States Constitution, as the source for his relief. Relief on that basis, however, is not available in a federal habeas action.

In sum, even if the enactment of Tampa Ordinance 8068-A contravened Fla. Stat. §166.041 (3) (c) -- and the state courts apparently did not think that it did -- that error of state law would not support federal habeas relief. I therefore recommend that the petition be dismissed.

Respectfully submitted,

/s/
THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

Dated: February 7, 1992

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendation contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 USC 636 (b) (1).

APPENDIX L

REDNER v. CITY OF TAMPA
48 Fla Supp 2d 69

REDNER, et al.
v.
CITY OF TAMPA

Case No. 89-15392

Thirteenth Judicial Circuit, Hillsborough County
May 22, 1991

HEADNOTE

Classified to Florida Supplement Digest

Zoning § 3; zoning -- city adult use ordinance -- what constitutes a zoning ordinance -- no valid enactment of where statutory adoption procedures not followed -- remand to circuit court from district court of appeal to apply correct version of ordinance

The defendants appealed their convictions for violating the City of Tampa's adult use ordinance, Chapter 43A of the Zoning Code. The circuit court held the ordinance was a zoning ordinance which had been invalidly enacted because the statutory requirements had not been followed. On the city's appeal, the Second District Court of Appeal remanded to the circuit court, holding the circuit court had not relied upon the correct version of Chapter 43A and ordering the circuit court to render an opinion

using Chapter 43A as originally enacted in Ordinance 8482-A.

On remand, the circuit court reversed the convictions, holding Ordinance 8482-A was a zoning ordinance which had not been enacted in compliance with the requirements of § 166.041(3)(c), Fla. Stat. (1983). Because Chapter 43A of the Code was promulgated under Ordinance 8482-A, the court held Chapter 43A was null and void.

An appeal from the County Court of Hillsborough County, Florida. (Decision upon remand from the Second District Court of Appeal).

APPEARANCES OF COUNSEL

Luke C. Lirot, Esquire, for appellants.

Michael A. Fogarty, Esquire, Linda Julin McNamara, Esquire, and **Michael Larrinaga, Esquire,** for appellee.

Before RICHARD A. LAZZARA, Circuit Judge.

OPINION OF THE COURT

In accordance with the opinion of *City of Tampa v. Redner*, 576 So.2d 339 (Fla. 2d DCA 1991), this Court has revisited this case and renders the following opinion using Chapter 43A of the City of Tampa Zoning Code as

originally enacted in Ordinance §482-A.[1]

The Appellants stand convicted of violating the adult use provisions of Chapter 43A of the Tampa Zoning Code. They have mounted a multi-pronged attack in an effort to overturn their convictions.[2] The Court has carefully reviewed their contentions and determines that it is appropriate to address only one issue[3] --was it required by

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[1]At a status hearing held on May 10, 1991, the Appellee provided the Court with a copy of Ordinance §482-A. This copy has been filed of record in the Appendix to this opinion and references to it will be noted as (App ---). At this hearing the Court also considered the Appellee's motion to remand the case to the Trial Court for the taking of additional evidence and testimony. After the court denied this motion on May 16, 1991, the Appellee by letter dated May 20, 1991, requested leave of the parties to file supplemental briefs or, in the alternative, to have the Court consider the briefs of the parties filed in connection with the Appellee's Petition for Writ of Certiorari to the Second District Court of Appeal. The Court by Order dated May 21, 1991, denied the primary request but granted the alternative request. The briefs reviewed have also been filed of record.

[2]The Appellants took a similar approach before the Trial Court and filed comprehensive motions to dismiss. (R 350-355; 373-378; 387-392 and 401-406). The Trial Court denied these motions. (R 446-461). Thereafter, the Appellant Redner was found guilty by a jury and Appellants Burns and Fernandez pled nollo contendere reserving their rights to appeal the denial of their motions to dismiss. Because of the common issues involved, their appeals were consolidated. (R 462-464).

[3]An opinion was rendered on May 8, 1990, in the case of *Redner v. State of Florida*, Appellate Case No. 89-4992, by another Circuit Judge in this judicial circuit sitting in his appellate capacity. The record in that appeal, which the Trial Court considered in this case and which this Court has also reviewed (see n.9 *infra*0, has been referenced

law that Ordinance 8482-A, which created Chapter 43A of the Tampa Zoning Code, be enacted in accordance with the notice and public hearing requirements of section 166.041(3)(c), Fla. Stat. (1983)?[4]

The predecessor ordinance regulating adult uses of the type at issue in the appeal was originally part of Chapter 43 of the Tampa Zoning Code. It was adopted on September 30, 1982, as Ordinance 8068-A. (R 795-798).

On February 17, 1984, Ordinance 8482-A was adopted. This ordinance promulgated a new zoning code for the City of Tampa which was denominated Chapter 43A. (R 647-648). It also contained provisions regulating adult uses. (App Sections 43A-68 and 43A-84) Although this new code was not to take effect immediately and was not applicable to the locations of the adult uses which constitute the basis of the Appellants' convictions until

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by the parties in their briefs, with the Appellee referring to it as "Redner I". To the extent that this opinion addressed and resolved the same common issues raised in this appeal, except the one specifically resolved by this Court, the Court adopts it as its own.

[4]Under this section, ordinances which rezone specific parcels of private real property or which substantially change permitted use categories in zoning districts must be enacted with specific procedures. Where the proposed rezoning or change in permitted use involves less than 5% of the land area of the municipality, notice to affected property owners and one public hearing are required. In cases in which the proposed ordinance deals with more than 5% of the total land area of the municipality, stricter procedures must be followed, one of which is that two public hearings be held. *Daytona Leisure Corporation v. Daytona Beach*, 539 So.2d 597, 599, n.2 (5th DCA Fla. 1989).

December 17, 1987,[5] the intent of the new zoning code was clear--"to establish and control land use regulations for the City of Tampa, except the Central Business District." (R 647).

The Appellants contend that Ordinance 8482-A which created Chapter 43A was not enacted in compliance with section 166.041(3)(c) and is invalid. The Appellee concedes that it did not utilize the requirements of this statutory subsection but instead followed the requirements of section 166.041(3)(a), Fla. Stat. (1983), which is all the law required because the new zoning code was not designed to take effect immediately and thus did not rezone property or change any permitted uses within a zoning district. Moreover, the Appellee argues that prior to the time Chapter 43A was in fact made specifically applicable to Appellants' adult uses by Ordinance 9880-A, the more stringent requirements of section 166.041(3)(c) were followed, a fact the Appellants do not dispute.

The issue for this Court's resolution is whether Ordinance 8482-A which created Chapter 43A of the Tampa Zoning Code, was a zoning ordinance within the meaning of section 166.041(3)(c)? If it was such a zoning ordinance then the City of Tampa was required to follow the stricter requirements of this statutory subsection and its

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[5]Ordinance 9880-A Specifically applied the provisions of Chapter 43A to the property on which the adult uses at issue were located. Prior to the enactment of this ordinance, the provisions of Chapter 43 continued to regulate the use of these properties (R 647-648).

failure to do so invalidates the Appellants' convictions in that they were convicted of violating provisions of the zoning code which were null and void. *Baywood Construction, Inc. v. City of Cape Coral*, 507 So.2d 768 (Fla. 2d DCA 1987), *David v. City of Dunedin*, 473 So.2d 304 (2d DCA Fla. 1985) and *City of Sanibel v. Buntrock*, 409 So.2d 1073 (2d DCA Fla. 1981), *pet. for rev. denied*, 417 So.2d 328 (Fla. 1982).

The Appellee's position is that all Ordinance 8482-A did was to change the text of the Tampa Zoning Code by adopting a "new zoning framework for future application" and left for another day its actual application to land use within the city on a quadrant by quadrant basis. (Brief of Appellee, pg.24). Thus, the Appellee concludes, because the ordinance did not have an immediate effect it did not rezone property or change any permitted uses within a zoning district and Section 166.041(3)(c) did not have to be utilized. The Trial Court adopted this argument in denying the Appellant's motions to dismiss. (R 447-452). This Court respectfully disagrees with the conclusions of the Trial Court and determines that the Trial Court erred in denying the Appellants' motions to dismiss ax to this issue.

There is no question that Ordinance 8482-A established Chapter 43A as an amendatory zoning code and is in fact a zoning ordinance. Indeed, its very title indicates that fact. (R 647) *Fountain v. City of Jacksonville*, 447 So.2d 353, 355-356 (1st DCA Fla. 1984). There is no question that Ordinance 8482-A substantially affected land use within the jurisdiction of the

City of Tampa, except the Central Business District. (App Sections 43A-6-12) *City of Sanibel v. Buntrock, supra*, pg. 1075. There is no question that Ordinance 8482-A divided the City of tampa, with the exception of the Central Business District, into zoning districts, defined and established those districts, and provided regulations for land usage within those districts. (App Sections 43A-16 and 43A-35). Hence, the ordinance had the effect of rezoning specific parcels of private real property within the city. *Dayton Leisure Corporation v. Daytona Beach, supra*, pg. 599. The only question is whether, because the actual application of Ordinance 8482-A was delayed until another day, it was still necessary to comply with the provisions of section 166.041(3)(c)? The Court concludes based on the record and the applicable law that the answer to this question is yes for the following reasons.

First, to accept the Appellee's argument would be contrary to the manifest intent of the legislature in promulgating section 166.041(3)(c). The legislature made it quite clear that when a municipality "initiates" an ordinance[6] of the type at issue in this case, it must strictly satisfy the requirements of that statutory subsection. The use of the word "initiated" in section 166.041(3)(c) is significant under the law. Although the legislature failed to

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[6]Section 166.041(1)(a), Fla. Stat. (1983), defined ordinance as "an official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law." There is no contention that Ordinance 8482-A is not such an ordinance.

define this term, this Court may resort to case law for the definition. *State v. Hagan*, 387 So.2d 943 (Fla. 1980) and *Bertens v. Stewart*, 453 So.2d 92 (2d DCA Fla. 1984). In *State v. Grant*, 85 So.2d 232, 234 (Fla. 1956) the word "initiate" is defined as follows:

> The word "initiate" is defined by Webster to mean "to introduce by a first act; to make a beginning with; to set afoot; to originate; commence; begin".

Given this definition, there can be no question that Ordinance 8482-A was an ordinance "initiated" by the City of Tampa in that it was the beginning, the commencement, and the origination of a new zoning code for the city. There is nothing in the statute to indicate that an ordinance such as this which is "initiated" but whose actual application is to take effect in the future is exempted from the statutory requirements. And it is not the function of this Court to engraft exceptions to a statute; that is the exclusive province of the legislature.

Second, as the statute has been interpreted, the law is clear; "zoning ordinances are null and void if not strictly enacted pursuant to the requirements of section 166.041. *David v. City of Dunedin*, 473 So.2d 304 (2d DCA Fla. 1985)." *Baywood Construction, Inc. v. City of Cape Coral, supra*, pg. 769. *Fountain v. City of Jacksonville, supra*, pg. 356. Based on the record considered by the Trial Court, Ordinance 8482-A is a zoning ordinance which substantially changed permitted use categories in zoning

districts. Indeed, the Trial Court had before it a "Stipulation of Facts" entered into between the Appellee and Appellants which related in part to the "Improper Enactment" issue raised in the motions to dismiss. In that stipulation, the Appellee agreed as follows:

3. *IMPROPER ENACTMENT--C. 166 F.S.*

1. Chapter 43-A, City of Tampa Code, is the City's Zoning Code.

2. Chapter 43-A was adopted by Ordinance 8482-A.

* * *

5. There are *material differences* between the permitted uses, and the standards for permitted uses, between the zoning districts in Chapter 43 and the generally corresponding districts in Chapter 43-A.

6. *Ordinance 8482-A is a zoning ordinance.*

7. Adoption of Zoning Ordinances by the City of Tampa is governed by Chapter 166, Florida Statutes, both by reference and by adoption of the provisions of Chapter 166 into the City Charter.

8. *Ordinance 8482-A applies to more than 5% of [sic] geographic area of the City of Tampa.*

(R 227 and 414) (emphasis supplied)

Based on this stipulation, section 166.041(3)(c) was clearly implicated when the City of Tampa "initiated" Ordinance

8482-A.

Third, the Appellee conceded to the Trial Court that when the zoning text was being considered for actual application to an individual's piece of property at the later public quadrant rezoning hearings held in accordance with the provisions of Section 166.041(3)(c), such an individual would have to petition the City Council "for an amendment to Chapter 43-A, which would not be done at the area-wide public hearing". (R 232-233). Thus it is logical to conclude that at the time of these later public hearings the zoning text of Chapter 43A was "cast in stone" and a member of the general public who objected to any of its provisions could not effect any change at these hearings but would be limited to petitioning the Tampa City Council *de novo* for an amendment to the already adopted zoning text.[7]

Moreover, the text of Ordinance 8482-A was the *sine qua non* for the later quadrant rezonings. That is,

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[7]The appellate courts of this State have made it quite clear that the notice and public hearing requirements of this statutory subsection are not hollow or meaningless rights. In that regard, as the Court in *Daytona Leisure Corporation v Daytona Beach, supra,* state:
Florida follows the majority view whereby measures padded in contravention of notice requirements are invalid (null and void if not strictly enacted pursuant to the requirement of section 166.041). (Cites omitted) Where an ordinance substantially affects land use (substantially changes permitted use categories) or rezones specific parcels of private real property, it must be enacted under the procedures that govern zoning and rezoning, i.e., section 166.041(3)(c). (Cite omitted) 539 So.2d 599.

without the textural foundation of the ordinance no quadrant rezonings could have been effected. Indeed, section 5 of the preamble to the ordinance reflects that premise: "That, until property within the City is *rezoned to the districts* established by this ordinance . . ." (R 647) (emphasis supplied).

Fourth, as the Attorney General of Florida so succinctly stated in Opinion 80-104:

> Thus, any amendment to the "*substantive provisions*" or "*general text* " of a zoning ordinance which has the effect of changing or altering existing uses or restrictions or existing regulations of land or permissible activities thereon within designated zones or districts is a type of rezoning. (emphasis supplied)[8].

It is significant that this opinion was in response to an inquiry (acknowledged by the Attorney General to be somewhat unclear in nature) from the City of Ocala regarding whether the special notice requirements of section 166.041(3)(c) must be followed if the city sought to change "either the procedural or *substantive provisions*" of its municipal zoning code "that might affect all *future* petitions to rezone private property but having no *immediate effect* on any pending proceeding to zone or rezone private

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[8]This statement by the Attorney General is in clear conflict with the argument made by Appellee at oral argument to the effect that no one cares about a zoning text because the text does not have anything to do with how a person can use his or her land.

property." (emphasis supplied).

Finally, the Trial Court's finding based on the record that Ordinance 8482-A did not constitute a rezoning of property conflicts with *Troup v. Bird*, 53 So.2d 717 (Fla. 1951), cited in the Attorney General's Opinion. The Supreme Court legally defined rezoning as follows:

> ... in a legal sense, rezoning ordinarily contemplates a change in existing zoning rules and regulations within a district, subdivision or other comparatively large area in a given governmental unit, which theretofore has been uniformly zoned in its entirety, . . . 53 So.2d 720.

As is reflected in the record, Ordinance 8482-A as initiated clearly contemplated a change in the existing zoning rules and regulations within the City of Tampa by replacing Chapter 43 of the zoning code with a new zoning code, Chapter 43A. Indeed, the evidence considered by the Trial Court[9] is clear that the change in the existing zoning rules and regulations effected by the ordinance substantially affected land use as to every piece of property in the city. That is, every piece of property in the city was rezoned to a new zoning district and there were major changes within the zoning district. (R I 448-450)

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[9]The Trial Court, with the consent of the parties, considered the record in Redner I (see n.3. *supra*). (R 143-146 and 243-244) This Court has also reviewed that record and will refer to that record as (R I--).

The record is clear: Ordinance 8482-A is a zoning ordinance and was initiated and adopted as an amendatory and definitive zoning code which was to control the use of land in the City of Tampa with the exception of the Central business District; it substantially affected land use within the city; and prior to its initiation and adoption the requirements of section 166.041(3)(c) were not followed. The fact that the ordinance's application was delayed and prior to its actual application to the adult uses at issue the requirements of section 166.041(3)(c) were followed is of no significance under the law.[10]

Therefore, the failure of the Appellee to comply with the requirements of section 166.041(3)(c) renders Ordinance 8482-A which promulgated Chapter 43A of the Tampa Zoning Code, the provisions of which the Appellants were convicted of violating, null and void.[11]

As the Florida Supreme Court so concisely stated in *Ellison v. City of Fort Lauderdale*, 183 So.2d 193, 195 (Fla. 1966):

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[10]The Appellee concedes that the hearings held in connection with the quadrant rezonings did not apply to the enactment of ordinance 8482-A. (Brief of the appellee, pg. 25).

[11]This Court recognizes the City of Tampa's authority to use its zoning power to regulate adult uses and that this authority "must be accorded high respect". *Young v. American Mini Theatres, Inc.*, 96 S.Ct. 2440, 2453 (1976) and *Renton v. Daytime Theatres, Inc.* 106 S.Ct. 925 (1986). However, this authority must be exercised in accordance with the notice and public hearing requirements mandated by the legislature in Section 166.041(3)(c). *Ellison, infra.*

> The specific grant of zoning power is conditioned by the provision for notice and public hearing. Since the City [Council] did not comply with the notice and public hearing provisions, the ordinance under which the [appellants were] arrested and convicted was invalid.

Therefore, the Appellants' convictions are reversed and their cases are remanded to the Trial Court with directions to discharge them.

APPENDIX M

28 USCS § 2254

§ 2254 State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a

proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration

of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. (June 25, 1948, ch 646, §1, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, § 2, 80 Stat. 1105.)